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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF MICHIGAN,

PETITIONER

vs.

GARY LAMAR JOHNSON,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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QUESTION PRESENTED

MAY A CRIMINAL DEFENDANT WHO DECLINES A TRIAL JUDGE'S OFFER OF A MISTRIAL UPON REQUEST, OFFERED BECAUSE OF A NECESSARY IN CAMERA DISCUSSION WITH A PROSECUTION WITNESS, CITE THE IN CAMERA DISCUSSION AS A VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION, OR HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS, JUSTIFYING A REVERSAL OF HIS CONVICTION?

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THE PEOPLE OF THE STATE OF MICHIGAN,

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TO THE COURT OF APPEALS

OF THE STATE OF MICHIGAN

NOW COME the People of the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Chief of the Criminal Division, Research, Training and Appeals, and Jeffrey Caminsky, Assistant Prosecuting Attorney, and pray that a

writ of certiorari issue to review the judgment of the Court of Appeals of the State of Michigan, entered in this cause on December 16, 1985, Leave to appeal denied by the Michigan Supreme Court on April 11, 1986, one justice dissenting.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported at 147 Mich App 542; ___ NW2d ___ (1985), and appended below as Appendix A; the order of the Michigan Supreme Court denying leave to appeal is unreported as yet, and appended below as Appendix B. Michigan Supreme Court Docket No. 77920.

STATEMENT OF JURISDICTION

The Michigan Court of Appeals entered judgment on December 16, 1985. The Michigan Supreme Court entered judgment on April 11, 1986. This Court's jurisdiction is invoked under 28 USC Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V to the United States Constitution provides, in pertinent part:

> "No person shall. . . be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty or property without due process of law. . . ."

Amendment VI to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witnesses against him. . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jur- isdictions the equal protection of the laws."

STATEMENT OF THE CASE

On October 12, 1983, the trial court, sitting without a jury, convicted Respondent of armed robbery and felony firearm, sentencing him on October 17, 1983 to 2 to 15 years for armed robbery, and a two-year consecutive sentence for felony firearm.

At the trial, prosecution witness Willie Thomas testified that on February 28, 1983, while working at a gas station in the City of Detroit, he was robbed by two men, one of whom was armed, and one of whom he identified as Respondent.

Clifford Williams, a 14-year old boy, also testified at trial. Originally, he testified that he did not see any of the robbers, could not identify Respondent, and could not tell if any of the robbers had a gun. Suspecting possible witness tampering, the trial court took the

witness, the court reporter, and the officer in charge of the case into chambers for a sequestered conference, outside the presence of counsel for either side. During the course of the interview, the witness disclosed that he had been offered money by Respondent's brother to testify that he could not identify the robbers; the interview concluded with the witness assuring the judge that he would tell the truth while testifying. For the protection of the witness, the judge agreed that he would not disclose anything that transpired in the courtroom during the trial.

At the conclusion of the interview, the judge called counsel into chambers, informed them that he could not divulge what had transpired, and admonished them that the proceedings in chambers were not to be the subject of any examination on the record at trial. The judge then

offered to declare a mistrial upon Respondent's request, but noting possible Double Jeopardy problems, indicated that without Respondent's request he would not do so. Respondent himself declined to move for a mistrial, with his attorney's full concurrence. Upon taking the stand again, Clifford Williams identified Respondent as the robber, and testified that he was the only one of the robbers who carried a gun. Pursuant to its prior ruling, the trial court prevented defense counsel from inquiring about anything that transpired in chambers.

Respondent appealed his conviction to the Michigan Court of Appeals, which reversed his convictions on December 16, 1985. The basis for reversal was that the trial court violated Respondent's Sixth Amendment right to confrontation by conducting an in camera interview with the key prosecution witness, and that

Respondent did not waive the issue by declining the court's invitation to move for a mistrial. On April 11, 1986, the Michigan Supreme Court denied Petitioner's timely application for leave to appeal, two justices dissenting.

REASONS FOR GRANTING THE WRIT

A CRIMINAL DEFENDANT WHO DECLINES A TRIAL JUDGE'S OFFER OF A MISTRIAL UPON REQUEST, OFFERED BECAUSE OF A NECESSARY IN CAMERA DISCUSSION WITH A PROSECUTION WITNESS, MAY NOT CITE THE IN CAMERA DISCUSSION AS A VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION, OR HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS, JUSTIFYING A REVERSAL OF HIS CONVICTION.

In his state court appeal, Respondent claimed, and the Michigan Court of Appeals agreed, that the trial court denied his constitutional right to confront the witnesses against him by conducting certain proceedings in camera; these proceedings ultimately revealed certain attempts to tamper with the witness whom the trial judge interviewed

in his chambers, on the record but away from Respondent, defense counsel, and the trial prosecutor. This case illustrates the dangers facing a trial judge when unexpected events interfere with the trial he is conducting, given the harsh reality of the Double Jeopardy Clause;[1] but beyond this, the case illustrates the extent to which criminal defendants will pervert the purposes of the double jeopardy protections, in efforts to ensure an "appellate parachute" in the event of an adverse verdict from the trier of fact. For a variety of reasons, such efforts must fail.

Respondent has not challenged the impartiality of the trial judge, but claims instead that the trial court abridged his right to confront his accusers. The Sixth Amendment[2] guaran-

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1 US Const, Am V
2 US Const, Am VI

tees that "in all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witnesses against him. . . . " Applied to state court proceedings through the Fourteenth Amendment,[3] Pointer v Texas, 380 US 400; 85 S Ct 1065; 13 L Ed 2d 923 (1965), the core of this right is the ability to confront witnesses at time of trial. California v Green, 399 US 149, 157; 90 S Ct 1930; 26 L Ed 2d 489 (1970). Moreover, while this right is not coextensive with the rule on hearsay evidence, both rules stem from the same roots in the common law, and both seek to address similar concerns. Harmon v Anderson, 495 F Supp (ED Mich, 1980); as the Michigan Supreme Court noted in People v Kirtdoll, 391 Mich 370, 385; 217 NW2d 37 (1974), "[t]he evil the right of confrontation sought to avoid was prose-

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[3] US Const, Am XIV

tion by means of ex parte affidavits, which would be of uncertain reliability."

However, the right of confrontation is not absolute, and may bow to accommodate other important legal and societal interests. Chambers v Mississippi, 410 US 284, 295; 93 S Ct 1038; 35 L Ed 2d 297 (1973). See also, Mancusi v Stubbs, 408 US 204; 92 S Ct 2308; 33 L Ed 2d 293 (1972). One such interest must be the integrity of the judicial process; and a criminal defendant may not reasonably claim the right to interfere with the trial court's ability to control the proceedings before it.

In this case, the record clearly shows that the trial court was presented with grounds to suspect that a key prosecution witness, a fourteen-year old boy, had been tampered with. Under the

circumstances, it would have been unreasonable for the trial court to do nothing, for such a course would merely have conceded the court's impotence to counter attempts to influence the trial through the improper manipulation of witnesses. Accordingly, the court acted properly in making inquiry in chambers, where the witness would not feel intimidated by either of the parties.

Petitioner does not contend that Respondent had no rights in this matter, however, and agrees with the trial court that he was entitled to a mistrial upon request. However, Respondent raised no question about the court's continued capacity to be impartial, and declined to move for a mistrial -- apparently using his Double Jeopardy protections to try to extract two chances at acquittal. Respondent's strategy appears to be as follows: if he declined to move for the

mistrial, then the court would grant one at its peril, for if a reviewing court found no manifest necessity for the mistrial, then Respondent would walk away from all charges. See, inter alia, United States v Dinitz, 424 US 600; 96 S Ct 1075; 47 L Ed 2d 267 (1976); United States v Jorn, 400 US 470; 91 S Ct 547; 27 L Ed 2d 543 (1971). On the other hand, if this Court found that the trial court should have granted a mistrial, then Respondent would get a second chance at acquittal by the simple expedient of failing to assert his rights at the proper time. This is best described as an illusion of alternatives: If one chooses A, he should have chosen B; if he chooses B, he should have chosen A. See, P. Watzlawick, The Situation is Hopeless, but Not Serious, p 81.

A defendant may not "sit back and harbor error to be used as an appellate

parachute in the event of jury failure," People v Brocato, 17 Mich App 277, 305; 169 NW2d 483 (1969). Nor may he cite as a ground for reversal a potential error which he attempts to use to his own tactical advantage. People v Ward, 133 Mich App 344; 351 NW2d 208 (1984). People v Baines, 68 Mich App 385; 242 NW2d 784 (1976). In this case, when Respondent declined the trial court's offer to declare a mistrial upon request, he forever waived the right to cite the court's failure to grant one as error, for he asserted primary control over the course followed by the trial court for Double Jeopardy purposes. United States v Dinitz, supra. Having done this, he may not cite the trial court's failure to force a spurned mistrial upon him as a basis for a new trial, for such a claim is nothing more than a demand to exercise two mutually exclusive rights simultaneously -- much like asserting

both a Sixth Amendment right to counsel, and a right to self-representation under Faretta v California, 422 US 806; 95 S ct 2525; 45 L Ed 2d 562 (1975). Such a tactic simply cannot succeed, for to hold otherwise is to concede the judicial system's inability to withstand attempts to subvert it -- and will ultimately lead to its downfall.

In passing, Petitioner notes that the Court of Appeals misunderstood the precise issue before it. Respondent concedes the distinction which the Court of Appeals drew between this case and LaChappelle v Moran, 699 F2d 560 (CA 1, 1983), relating to differences between jury and non-jury trials; but all LaChapelle stands for is the proposition that in a non-jury trial, the court need not grant a mistrial at all -- even upon the defendant's request. It provides no insights for dealing with cases where the

court itself is sitting as the trier of fact. Moreover, that case involved a court's attempt to protect a witness from undue embarrassment -- not, as here, an attempt to subvert the entire judicial process, which the court must investigate and combat if the concept of due process is to have any meaning. In fact, between the two pages of LaChappelle which the Court of Appeals cited, is the following passage, which applies to the case at hand:

> "To be sure, in camera proceedings are seldom proper in a criminal trial. However, in the exercise of the court's residual power to ensure a just trial, and protect jurors and witnesses, a judge may in very rare circumstances feel it essential to confer with a juror outside the presence of others, including the defendant. One example of such a conference might be where a juror or witness, having been threatened, wished to speak to the judge privately about the threat." LaChappelle, supra at 565. (Citations omitted). See also, United States v Anderson, 509 F2d 724 (CA9, 1975) cert den 420 US 910; 95 S Ct 831; 42 L Ed 2d 840

(1975); United States v Ruiz-Estrella, 481 F2d 723 (CA2, 1973).

Also relevant to this case is the Sixth Circuit decision in Dorsey v Warden, Southern Michigan State Prison, 523 F2d 590 (CA6, 1975). In that case, the court affirmed the district court's dismissal of a criminal defendant's habeas petition on grounds that the trial court did not deny the petitioner's confrontation rights by holding a contempt hearing involving a prosecution witness outside his presence, and not permitting him to cross-examine her about her testimony at such a hearing. The court noted that, as here, the excluded testimony related not to the substantive charges, but rather to collateral issues. Accordingly, it held that the trial court did not violate petitioner's right to confrontation.

Petitioner urges a similar resolution by this Court; in addition, upon the full record, it is apparent that even if error existed, it was constitutionally harmless. Chapman v California, 386 US 18; 87 S Ct 824; 17 L Ed 2d 241 (1967).

CONCLUSION

WHEREFORE, Petitioner prays that this Court grant plenary review, reverse the holding of the Michigan Court of Appeals, and reinstate Respondent's convictions.

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Dated: June 3, 1986

JC/ag

APPENDIX

OPINION OF THE MICHIGAN COURT OF APPEALS

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-v- Dec. 16, 1985

GARY LAMAR JOHNSON, No. 76159
Defendant-Appellant.

Before: R.S. Gribbs, P.J., Cynar and P.J. Duggan,* JJ.

PATRICK J. DUGGAN, J.

Defendant was convicted of armed robbery following a bench trial. He appeals as of right. Defendant and a co-defendant, Juarez Bolden, were charged with robbing a gas station. An employee of the gas station testified that defendant Johnson was one of the individuals who committed the robbery. Clifford Williams, a fourteen-year-old witness, testified that he was at the gas station the night the robbery allegedly took

*Circuit judge, sitting on the Court of Appeals by assignment.

place; but contrary to statements he had previously given, Williams initially testified at trial that he could not identify the robbers. At this point the trial judge ordered a recess, and took Williams, the court reporter and the officer in charge into chambers for an in camera hearing. The judge was concerned that someone may have ordered Williams to change his story. After questioning by the judge and the police officer (some of which questioning by the police officer took place out of the presence of the judge and the court reporter), Williams admitted that he had been offered money by the brother of the defendant if he would testify that he could not identify the robbers. He then assured the judge that he would tell the truth while testifying.

In an effort to protect Williams, the court refused to disclose to the prosecutor or the defense attorney what

was said during the in camera hearing. The court, however, did indicate to defendant and defense counsel that he would grant a mistrial if one was requested. For "tactical reasons" defendant refused to request a mistrial.

Williams then testified during the bench trial that the defendant was one of the robbers. The court, however, prevented defense counsel from inquiring about any of the discussion that took place in chambers. The court subsequently found defendant guilty of the armed robbery charge.

The only issue raised by appellant is whether defendant is entitled to a new trial because of a violation of his constitutional rights under the Sixth Amendment. U.S.C.A. Const. Amend. 6. Defendant contends that the in camera discussion between the trial judge and the prosecution witness violated his right to have a public trial by an

impartial jury and to be confronted by the witnesses against him. Defendant believes that such violation requires the grant of a new trial.

The Confrontation Clause of the Sixth Amendment requires that "in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him" Applicable to the states through the Fourteenth Amendment, the confrontation clause "guarantees a criminal defendant the right to be present at every stage of his trial, Illinois v Allen, 397 US 339, 90 SCt 1057, 25 LEd2d 353 (1970), and to physically confront, and to cross-examine the witnesses against him. Davis v Alaska, 415 US 308, 94 SCt 1105, 39 LEd2d 347 (1974)." LaChappelle v Moran, 699 F2d 560, 564 (1983). Because such in camera proceedings during a criminal trial are "manifestly conceptually incompatible with our system of criminal

jurisprudence," close consideration of this question is warranted. U.S. v Arroyo-Angulo, 580 F2d 1137, 1141 (1978).

A defendant's right to be present at his trial extends to any stage of his trial that "bears, or may fairly be assumed to bear, a relation, reasonably substantial to his opportunity to defend." Snyder v Massachusetts, 291 US 97, 106, 54 SCt 330; 78 LEd 674 (1934). However, not every aspect of a judicial proceeding is a stage at which the accused must be present. For example, in LaChappelle, supra, where the trial judge in a jury trial sensed that the sixteen-year-old complainant had refused to answer defense counsel's question because of embarrassment, and saw fit to conduct an in camera interview with her out of the presence of counsel and the jury, the court held that the in camera conference was not a stage of the trial at which the confrontation clause gave a right to be

present. LaChappelle, however, is distinguishable from the instant case. In LaChappelle, the judge was not the trier of fact and the court specifically noted that "The witness's response and demeanor were not being judged at the in camera conference..." LaChappelle, supra, at 566. The LaChappelle court specifically noted "the confrontation clause guarantees a defendant the right of physical presence when a witness's response and demeanor are being tested before the trier of fact." LaChappelle, supra, at 566.

Given the fact that Williams was an eyewitness to the armed robbery, his credibility certainly was a significant factor in the decision made by the trier of fact. Certainly, had this same information been conveyed to a jury without the defendant or his counsel being present, a new trial would be mandated. An in camera proceeding before

a judge in a bench trial does not require a different result where the information communicated to the judge may well have influenced his decision as the trier of fact.

In this court's opinion, defendant's Sixth Amendment rights were violated. Mr. Williams made statements to the trier of fact during the in camera hearing which the defense was not given any opportunity to refute. The statements made by Mr. Williams could be interpreted as adverse to defendant. Defendant had no opportunity to cross-examine the witness with regard to these statements; nor was the defense even aware of the substance of these statements. This violation of the defendant's Sixth Amendment rights mandates a new trial.

We also believe that defendant's rights to due process guaranteed to him under the 14th Amendment of the Federal Constitution mandate a new trial. The

relevant determination under the Due Process Clause is whether the judge's actions were so egregious and fundamentally unfair as to deprive the defendant of his right to trial based on untainted evidence before an impartial trier of fact. See LaChappelle, supra, at 566-7.

Generally, courts regard in camera proceedings during criminal trials as improper. Ex parte communications shadow the impartiality, or at least the appearance of impartiality, of any judicial proceeding, particularly a bench trial where the judge sits as the trier of fact. Grieco v Meachum, 533 F2d 713 (1976).

In the instant case, the impartiality of the trial judge following the in camera proceeding is clearly in question. The information obtained by the judge during the in camera conference may well have influenced the judge's opinion of the credibility of the eyewitness testi-

mony. Moreover, the trial judge communicated to defense counsel his concerns about his ability to remain impartial based on the information received in chambers. Because this was a bench trial, defendant's right to a trial before an impartial trier of fact was jeopardized and he is entitled to a new trial.

Appellee argues that a new trial should not be granted because defendant was given an opportunity for a mistrial and refused it. He should, therefore, not now be allowed to claim error. We disagree. We recognize that the trial judge was in a difficult position. If he granted the mistrial without defendant's consent at that stage of the proceedings, defendant may well have been successful in precluding a second trial on the basis of double jeopardy. If he didn't grant the mistrial, defendant most certainly would assert his conduct as the basis for

a new trial, as he has done. Appellee contends that defendant should not be able to reject the court's offer for a mistrial, thereby implying that he is satisfied that the court can be impartial, and then later attack the court's conduct.

While we do not condone a party deliberately refusing to object to "error" and then awaiting an adverse verdict before asserting it as error, we believe the circumstances here should not preclude defendant from now raising this issue. In this case, defendant was never sufficiently informed of what took place during the in camera hearing to request a mistrial. While the court did suggest that what took place in chambers may have affected his impartiality, defendant did not know why. Defendant may have assumed that what took place in chambers, was not significant enough to clearly affect the court's impartiality. In other words, he

may have assumed that the court could set aside what took place in chambers and decide this case in a fair and impartial manner. This defendant chose to be tried without a jury before that judge. Without knowing what took place in chambers, defendant could not make an informed decision as to whether or not to request a mistrial. By refusing the opportunity to obtain a mistrial, defendant did not waive his right to assert a violation of his constitutional rights when the facts of what took place in chambers, became known to him.

In reversing the trial court, it is important to note that we find the trial judge's motives in holding the in camera hearing beyond reproach.

> "Judges in our system are not mere bureaucrats. They have the ultimate responsibility to see that a trial is conducted fairly, and in difficult circumstances such as occurred here, they must do what they think right." LaChappelle, supra, at 567.

The trial judge suspected that a witness may have been threatened. He was faced with a difficult decision and he dealt with it in a manner that he thought was appropriate. His integrity is not in question.

However, for the reasons indicated above, a new trial must be ordered.

Reversed.

/s/ Roman S. Gribbs

/s/ Walter P. Cynar

/s/ Patrick J. Duggan

ORDER OF THE MICHIGAN SUPREME COURT

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 11th day of April in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable G. MENNEN WILLIAMS, Chief Justice

CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DOROTHY COMSTOCK RILEY,
DENNIS W. ARCHER,
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

SC: 77920
COA: 76159
LC: 83-01917

GARY LAMAR JOHNSON,
Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the question presented should be reviewed by this Court.

Boyle and Riley, JJ., would grant leave to appeal.

STATE OF MICHIGAN -- ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme (seal) Court at Lansing this 11th day of April in the year of our Lord one thousand nine hundred and eighty-six.

/s/ Corbin R. Davis
Deputy Clerk